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Supreme Court of the United States

October Term, 1976
1976 No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,

Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF SOUTH DAKOTA, ET AL., AS AMICI CURIAE

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Certain other interested States, such as California, did not have an opportunity to examine fully the merits of the questions present prior to the printing of this *Amici Curiae* Brief. The Office of the Clerk will be advised directly if they elect to join in the views expressed herein.

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I.

INTEREST OF AMICI CURIAE

In *Oliphant* v. *Schlie, et al.*, 544 F.2d 1007 (9th Cir. 1976), a Federal Circuit Court of Appeals for the first time has approved the exercise of criminal jurisdiction by an Indian tribe over a non-Indian. This decision, breaking new ground in the area of tribal criminal jurisdiction, has profound implications.

The Attorney General of the State of South Dakota states that the decision in *Oliphant*, together with *Belgarde* v. *Suquamish Indian Tribe* (9th Cir., No. 75-3319, not yet decided), has a definite impact upon the State of South Dakota and its citizens. There are nine Indian tribes located within the State of South Dakota.[1] Further, there are eight reservations or former reservations located within the boundaries of the State of South Dakota.[2] Further, the area of Indian country within the State of South Dakota consists of over five million acres, including trust land, and comprises all or significant portions of 15 of the 67 counties in South Dakota. Within the reservation boundaries themselves, a significant percentage of the resident population is non-Indian. In addition, many South Dakota citizens and out-of-state tourists travel through reservation areas on state and federal highways.

Further, since the decision of the District Court in this case, five tribes within the State of South Dakota have passed tribal ordinances which assert criminal and civil jurisdiction over non-Indians within the confines of their reservations.[3] Additionally, on numerous occasions, these Indian tribes located within the State of South Dakota have attempted, over the objections of the State of South Dakota, to enforce these ordinances against non-Indian citizens.[4]

There is no question but that relationships between Indian and non-Indian citizens within the confines of an Indian reservation are extremely complex and naturally subject to

1. The Flandreau, Rosebud, Oglala, Crow Creek, Lower Brule, Yankton, Sisseton-Wahpeton, Standing Rock and Cheyenne River Sioux Tribes.

2. The Sisseton-Wahpeton, Yankton, Lower Brule, Crow Creek, Rosebud, Pine Ridge, Standing Rock and Cheyenne River Reservations.

3. The Oglala, Rosebud, Sisseton-Wahpeton, Crow Creek and Cheyenne River Sioux Tribes.

4. A total of 95 such attempts have been reported to the South Dakota Attorney General's office.

some change. However, citizens of all races have been hampered in their efforts toward the development of constructive and cooperative relations between tribal governments, municipalities, political subdivisions and state governments by the fast pace of changes in federal Indian policy, as well as changing interpretations of existing statutes by the judiciary. *Oliphant* is a typical case in point. This Court is now called upon to resolve the question of whether an Indian tribe may exercise criminal jurisdiction over a non-Indian. This "question" has lain dormant for over one hundred years, and the understanding during that time period of virtually all courts, tribes and states was that summarized by Felix Cohen:

> On the other hand, attempts of tribes to exercise jurisdiction over non-Indians, although permitted in certain early treaties, have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody. F. Cohen, *Handbook of Federal Indian Law* (University of New Mexico, Reprint, 1971), p. 148.

The decision of the Ninth Circuit Court of Appeals now changes that common understanding.

Non-Indian citizens, who decades ago decided to reside or remain within the confines of an Indian reservation, may now suddenly find themselves subject to tribal jurisdiction. This event could not have been reasonably foreseen by those non-Indian citizens and would create undue hardships for them as they would be subject to the jurisdiction of a governmental entity in which they are virtually excluded from participation.

It is not fair to analogize the position of these non-Indian, permanent residents on an Indian reservation to that of transients traveling through the jurisdiction of another govern-

mental entity. First, the permanency of their residency gives them a continuing interest in the laws and ordinances which govern them. Second, it must be remembered that these individuals have never left the confines of their original sovereign entity, the State of South Dakota. Thus, they are not in a position similar to that of international travelers who have left the boundaries of their original governmental entity.

The Court in the instant case is called upon to decide an especially significant question in the field of Indian law within the confines of a specific factual situation. However, the question before the Court is truly an abstract one. Whether state and local law enforcement officials have properly exercised their undisputed jurisdictional prerogatives over criminal conduct by non-Indians within the confines of an Indian reservation in the particular circumstances set forth in this case is of no relevance. There are appropriate equitable and legal remedies against public officials who fail to carry out properly their duties or responsibilities. The question must be determined with reference to the broader principles involved.

It is important to realize that the decision of the Ninth Circuit in this case disturbs an almost one-hundred-year status quo during which time it was understood that non-Indians were not subject to the criminal jurisdiction of Indian tribes. The decision in this case will not result in the impairment of the ability of any Indian tribe to govern itself. Intratribal relations will not be affected adversely by a reversal of the Ninth Circuit's decision. The decision in this case will have no impact upon the long standing and appropriate limits of a state government's jurisdiction over tribal members within the confines of a reservation. Tribal self-government has developed steadily since 1934, without the imposition of criminal jurisdiction over non-Indians. Indeed, the development of tribal government without criminal jurisdiction over non-Indians is basically akin to the development of municipalities and state

political subdivisions within the boundaries of Indian reservations without jurisdiction over tribal members. In both cases, the respective governmental authorities have recognized the limits of their jurisdiction and have worked within the limits of that jurisdiction since tribal self-government became the central focus of federal Indian policy with the passage of the Indian Reorganization Act of 1934. In short, a reversal of the Ninth Circuit's decision would merely maintain the status quo and leave Indian tribes in the historical jurisdiction position which they have occupied for over a century.

SUMMARY OF ARGUMENT

The court below has held that Indian tribes may exercise criminal jurisdiction over non-Indians. Amici contend that this holding by the court below is erroneous.

The doctrine of inherent tribal sovereignty is relied upon by the court below as the source for this criminal jurisdiction over non-Indians. Not only is the doctrine of inherent tribal sovereignty a particularly elusive concept with no clear boundaries, but also a very limited concept designed for use in resolving questions of federal preemption rather than providing a broad and ill-defined range of governmental powers for Indian tribes.

Further, the treaty involved in the instant case is primarily silent on the question of criminal jurisdiction over non-Indians. Nevertheless, when viewed in the context of the history of federal and Indian treaty-making, it is clear that this silence does not bespeak a grant of criminal jurisdiction over non-Indians to the Indian tribe involved but rather bespeaks a denial of that jurisdiction. When such jurisdiction was intended by the United States to be granted to Indian tribes, it gave specific grants. Later, as the attitudes of the federal government toward the granting of this jurisdiction to Indian tribes changed, the grant of jurisdiction was either expressly denied or the denial implied through silence.

Neither the concept of inherent tribal sovereignty, nor the particular treaty involved, will grant the Suquamish Tribe criminal jurisdiction over non-Indians. In addition, the federal statutory scheme regulating criminal conduct in Indian country makes clear that Indian tribes do not have such jurisdiction over non-Indians. The express language of 18 U.S.C. 1152 and 1153 sets forth the general outlines for the exercise of criminal jurisdiction in Indian country. These statutes must be construed as creating serious anomalies and contradictions unless it is presumed that Indian tribes cannot exercise criminal jurisdiction over non-Indians. The legislative history behind 18 U.S.C. 1165, and the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, also reenforce this central precept of federal Indian policy that Indian tribes cannot exercise criminal jurisdiction over non-Indians.

The Bureau of Indian Affairs and the United States Department of Interior have, until the very recent past, held that Indian tribes do not possess criminal jurisdiction over non-Indians. This position of the Bureau of Indian Affairs and the Department of Interior was expressed in both a Solicitor's Opinion and in the Model Code of Indian Offenses. Further, in the Department's revision of Felix Cohen's work on federal Indian law, the same conclusion is reached. The shift in the B.I.A.'s attitude toward this question since 1970 is not well-founded, and the historic position of the B.I.A. and the Department of Interior is more persuasive.

The policy questions involved in this case also militate against a holding that Indian tribes can exercise jurisdiction over non-Indians. Regulation of non-Indian criminal conduct is not an essential attribute of tribal self-regulation. Federal Indian policy clearly requires noninterference by states in the conduct of internal tribal affairs. However, regulation of non-Indian criminal conduct is clearly not the type of internal affair which federal Indian policy contemplates as essential. The problems of

law enforcement within Indian country are extremely complex, and state political subdivisions operating within the confines of Indian country are subject to virtually symmetrical restrictions to those the Tribe now seeks to eliminate in the dealing by such state political subdivisions with Indian offenders. Amici submit that these symmetrical restraints are appropriate and that the removal of one set of restraints would not provide effective law enforcement. Rather, Amici submit that effective law enforcement within the confines of Indian country can be obtained only through the cooperation of federal, state, and tribal governments and state political subdivisions. This cooperation has been tried at various locations throughout the United States and does represent a viable policy.

II

ARGUMENT

A. THAT THE QUESTION OF WHETHER AN INDIAN TRIBE MAY EXERCISE CRIMINAL JURISDICTION OVER A NON-INDIAN IS ONE OF FEDERAL PREEMPTION RATHER THAN INHERENT TRIBAL SOVEREIGNTY.

The court below relies throughout its discussion of the case upon the concept of original tribal sovereignty. Amici believe that Judge Kennedy in his dissenting opinion is correct in pointing out that the issue is "in fact, one of federal preemption of the regulation in the field of Indian affairs." As Mr. Justice Marshall stated in *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973):

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. . . . The modern cases thus tend to avoid re-

liance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. *Id.* at 171.

Justice Marshall goes on to explain the utility of the Indian sovereignty concept and the limitations of that concept.

> The Indian Sovereignty Doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. *Id.* at 172.

The concept of tribal sovereignty was first utilized by Mr. Chief Justice Marshall almost one hundred and fifty years ago in *Worcester* v. *Georgia*, 31 U.S. 515 (1832). Since that original articulation, the concept of Indian sovereignty has undergone, in the words of Mr. Justice Marshall, "considerable evolution," *McClanahan, supra,* at 171. Nevertheless, this Court has always recognized that the Indian tribes were not "possessed of the full attributes of sovereignty," and that only the States and the federal government were full sovereigns:

> But these Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. *United States v. Kagama*, 118 U.S. 375 at 379 (1886).

In *Williams* v. *Lee*, 358 U.S. 217 (1959), this Court further explained the context in which the concept of tribal sovereignty is valid:

> Over the years, this Court has modified [the tribal sovereignty concept] in cases where essential tribal

> relations were not involved and where the rights of Indians would not be jeopardized. . . . Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 219-220.

Thus, the Court has consistently used the doctrine of limited tribal sovereignty in connection with the regulation by a tribe of intratribal relations among its members. In fact, the primary restriction on the tribal sovereignty concept has been its limitation to intratribal affairs. The federal courts have been extremely protective of the tribes' authority to regulate the conduct of their own members subject only to occasional intrusions by federal statute. The boundaries and limitations of a state government's ability to interfere in such relationships have been clearly marked and severely limited. On the other hand, the concept of tribal sovereignty has never been approved for use outside the context of intratribal relations and should not be so used at this time.

Rather, the concept of limited tribal sovereignty should be used only as a backdrop against which to interpret federal statutes and treaties. These statutes make clear that Congress has never statutorily granted Indian tribes jurisdiction over non-Indians, and further, only rarely have treaties granted the exercise of criminal jurisdiction by Indian tribes over non-Indians. The question of this case is one of preemption, not original sovereignty.[5]

A further reason for not deciding this case on the grounds of inherent tribal sovereignty is the elusive nature of the boundaries of that concept. It is difficult to see where limits on

5. For a full discussion see Martone, "American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License," 51 *Notre Dame Lawyer* 600 (1976).

the inherent tribal sovereignty doctrine could be placed once the doctrine is approved for use outside of the federal preemption context. Indeed, as noted in *McClanahan*, it has largely been rejected even where the question is the limitation of state regulation, rather than the exercise of governmental powers by a tribe. Amici strongly believe this case should also be resolved with reference to the treaties and statutes and policies involved rather than upon the ill-defined concept of tribal sovereignty.

B. THAT THE SILENCE OF THE TREATY OF POINT ELLIOTT DOES NOT JUSTIFY THE SUPPOSITION THAT CONGRESS INTENDED TO PERMIT INDIAN TRIBES TO EXERCISE CRIMINAL JURISDICTION OVER NON-INDIANS.

Both the majority opinion below and the Tribe make much of the fact that the Treaty of Point Elliott, 12 Stat. 927 (1859), does not have any specific reference to the question of tribal jurisdiction over non-Indians. Their argument is rooted in their unsupported assertion that such jurisdiction existed in the Tribe as an attribute of the Tribe's "sovereignty" and continued unabated in the absence of an express provision prohibiting tribal jurisdiction over non-Indians. While it is true that some later Indian treaties made explicit the inability of Indian tribes to exercise such criminal jurisdiction and to punish non-Indians, the silence in the Treaty of Point Elliott certainly does not support a contrary inference. In order to fully comprehend the import of various provisions in the Treaty of Point Elliott, it is necessary to adopt a historical perspective concerning Indian treaties.

Felix Cohen has given this summary sketch of the development of Indian treaties over the course of time:

> Some of the earliest treaties adopt the rule usual in treaties between equals. Whites committing offenses

> within the Indian country against Indian laws are subjected to punishment by the Indian tribe, just as Indians committing offenses against state or federal laws outside the Indian country are subjected to punishment by state or federal courts.
>
> A number of treaties adopt a modified rule, similar to that found in treaties between the United States and various Oriental nations, whereby the United States is granted jurisdiction over its citizens in the Indian country, to punish them for offenses they may commit, and the Indian tribe undertakes to deliver such offenders to the agents of the Federal Government. F. Cohen, *supra*, at 45.

In the 1958 revision of Felix Cohen's treatise by the United States Department of the Interior, a summary of federal treaty-making history is given as follows:

> Generally speaking, offenses by non-Indians against Indians are punishable in federal courts where the offense is one specified in the Federal Code of Territorial Offenses. This is not always the rule. Early treaties frequently provided that non-Indians committing offenses in Indian country against Indians should be subject to punishment by tribal authorities. This rule, which followed the practice in international treaties, was abandoned after a few years of treaty-making, and many of the later treaties expressly provided that white offenders should be delivered up to the federal authorities for prosecution. United States Department of Interior, *Federal Indian Law*, at 323 (1958).

The Treaty of July 2, 1791, with the Cherokee Indians, 7 Stat. 39, states in Section 8:

> If any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokee's lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please.

As the dissenting opinion below points out, it is difficult to explain the importance of this provision if the tribe already had such authority as an attribute of "inherent sovereignty." Similarly, why does the treaty provision distinguish between non-Indians who are merely passing through Cherokee lands and those who have settled upon such lands? It would seem that the "inherent sovereignty" approach would justify the exercise of criminal jurisdiction against either of those two categories. Therefore, the exact text of the Cherokee Treaty indicates that power to punish non-Indian offenders was not inherent with Indian tribes as viewed by the federal government as early as 1791, and that at no point did the federal government ever relinquish criminal jurisdiction over non-Indian transients passing through Indian country to the Cherokees.

The language of the Treaty of Point Elliott, makes no such specific grant of jurisdiction over non-Indian settlers to the Suquamish Tribe. In Article IX of such treaty, the Suquamish "acknowledged their dependence on the Government of the United States. . . ." Further, in the event of Indian offenses against both Indians and non-Indians, the Tribe agreed "not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial."

The acknowledgement of dependence upon the United States certainly is a central provision in the treaty. It is a provision which demonstrates the inapplicability of the Tribe's

sovereignty concept to the question of jurisdiction over non-Indians. Rather, as has been previously noted, the concept of tribal sovereignty should be limited to its proper role in discussing questions dealing with federal preemption. The procedures set forth in Article IX of the Treaty of Point Elliott for the delivery of Indian offenders against the laws of the United States to the federal authorities certainly militates against an interpretation that offenders who are not Indians could be dealt with under the tribal system of justice rather than delivering them to the federal authorities for trial. Therefore, the silence of the Treaty of Point Elliott on the question of Indian jurisdiction over non-Indians can be interpreted only as confirming the absence of such jurisdiction.

The opinion of the United States Attorney General in discussing an Indian treaty with the Choctaw Tribe is persuasive. In discussing the Choctaw Treaty, the Attorney General stated:

> The Choctaws express a wish in the treaty that Congress would grant to the Choctaws the right of punishing, by their own laws, 'any white man' who shall come into the nation, and infringe any of their national regulations, (Article 4). But Congress did not accede to this request. On the contrary, it made provision, by a series of laws, for the punishment of crimes affecting white men, committed by or on them in Indian country, including that of the Choctaws, by the courts of the United States. (See Act of June 30, 1834, iv Stat. at large, p. 729, and Act of June 17, 1844, v Stat. at large, p. 680.) These Acts cover, so far as they go, all crimes except those committed by Indian against Indian. 7 *Op. Atty. Gen.*, 174, 179 (1855).

This contemporaneous opinion by the United States Attorney General should be accorded high weight in construing the

understanding of the federal government as to tribal jurisdiction over Indians and non-Indians at the time the Treaty of Point Elliott was made.

As was noted by Felix Cohen, the patterns of federal Indian treaties varied considerably over time. However, with few exceptions such as the Cherokee Treaty previously cited, wherein the federal government granted express authority to the Cherokee Tribe to exercise jurisdiction over certain (but not all) non-Indians, the treaties have uniformly prohibited this exercise of jurisdiction over non-Indians by Indian tribes. This denial has sometimes been basically by silence, such as the Treaty of Point Elliott and that of the Choctaws. Sometimes this was done by implication through language relative to the punishment of persons committing offenses against the tribe. In this regard, Article V of the treaty between the United States and the Hunkpapas Band of the Sioux Tribe, ratified July 16, 1825, 7 Stat. 257, is typical:

> [I]t shall be the duty of said Chiefs, upon complaint being made as aforesaid, to deliver up the person or persons against whom the complaint is made, to the end that he or they may be punished agreeably to the laws of the United States. And in like manner, if any robbery, violence or murder, shall be committed on any Indian or Indians belonging to the said band, the person or persons so offending shall be tried, and if found guilty, shall be punished in like manner as if the injury had been done to a white man. . . . And the said Hunkpapas Band engage, on the requisition or demand of the President of the United States, or of the agents, to deliver any white man resident among them.[6]

6. For similar language, see Article V of the treaty between the United States and the Sioune and Ogallala Tribes, ratified July 5, 1825, 7 Stat. 252; Treaty with the Teton, Yancton, Yanctonies Bands of the Sioux Tribe of Indians, ratified June 22, 1825, 7 Stat. 250.

Nevertheless, the language in this particular treaty leaves no doubt that the federal government will be the punishing agency for any offenses committed by non-Indians against Indians, even though the language is not as clear as would be evidenced in later treaties.

In the Second Treaty of Fort Laramie, 15 Stat. 635 (1868), the language relative to tribal jurisdiction over non-Indians reached what is perhaps its all-time high in clarity. The second paragraph of Article I states:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

This language is particularly interesting in two areas. First, the references to bad men among the whites committing "any wrong" upon a person or property of Indians suggests exclusive federal jurisdiction. Second, the offender is to be delivered to the United States for punishment "according to the laws of the United States." It is difficult to see how this language could be construed as leaving any jurisdiction over non-Indians to the Indian tribe whatsoever or how it is consistent with the concept of inherent tribal sovereignty.

Amici have dwelt at some length upon the wide variance of treaty language in the course of almost one hundred fifty years of treaty-making with various Indian tribes. That language runs the entire gamut on the question of tribal jurisdiction over non-Indians. First, in extremely early treaties such as the Cherokee Treaty, the tribe was explicitly granted jurisdiction

over certain non-Indians. Second, there was a phase in which, such as the Hunkpapa Treaty, non-Indians were to be delivered to a federal Indian agent upon his demand and a further assurance to the tribe that offenders against Indians and Indian property would be dealt with by the federal government "as if the crime were committed against a white person." Then, there was the time period, such as the Treaty of Point Elliott, wherein the tribe acknowledged its dependence to the United States Government and the balance of the treaty was generally silent as to the question of jurisdiction. In this case, one must rely upon the collateral evidence such as the United States Attorney General's Opinion describing the Choctaw Treaty made at roughly the same time. Finally, there is the example of the Second Treaty of Fort Laramie wherein, the exclusion of criminal jurisdiction over non-Indians from Indian tribes is made explicit.

Amici submit that this varying history and language is most easily explained, not in a notion of tribal sovereignty which includes a concept of criminal jurisdiction over non-Indians unless explicitly denied, but rather in the notion of dependence upon the federal government by which the tribe had no criminal jurisdiction over non-Indians except when such jurisdiction was explicitly granted to them. Not only does this interpretation harmonize with the language of the Cherokee Treaty, the 1855 Attorney General's Opinion and the whole development of Indian treaties, but also with the case law as developed in the federal courts during this same period of time.

C. THAT VARIOUS FEDERAL STATUTES RELATIVE TO CRIMINAL JURISDICTION WITHIN INDIAN COUNTRY MAKE CLEAR THAT INDIAN TRIBES DO NOT HAVE JURISDICTION OVER CRIMINAL OFFENSES BY NON-INDIANS.

Respondents' position in the lower courts was that the

federal scheme for the regulation of criminal conduct within the boundaries of Indian country provides for concurrent jurisdiction by an Indian tribe over criminal offenses committed by non-Indians. The Respondents go on to argue that such concurrent jurisdiction results from a tribe's inherent sovereignty and that such concurrent jurisdiction could be withdrawn from a tribe only through explicit federal legislation. As shown immediately above, the Tribe's reliance upon inherent tribal sovereignty is misplaced. Both treaty interpretation and the concept of federal preemption preclude the Tribe from relying upon the doctrine of tribal sovereignty.

Nevertheless, Amici contend that even granting *arguendo* that the Tribe's inherent sovereignty argument is correct, the federal statutory scheme covering criminal conduct in the Indian country makes clear that the Tribe does not have concurrent jurisdiction over non-Indian offenses.

The first statute of interest in this regard is 18 U.S.C. § 1152:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

This particular section was enacted originally as Section 4 of the Indian Trade and Intercourse Act of 1802, 2 Stat. 141, and reenacted in 1817, 3 Stat. 383, and as Section 25 of the Indian Trade and Intercourse Act of 1834, 4 Stat. 733, and modified again in 1854, 10 Stat. 270. Although this statute has had a considerable legislative history, two items bear particular importance. First, Congress has not seen fit to revise this statute since 1854. Second, its central concepts have not been changed during its history. Beginning with the earliest Trade and Intercourse Acts, Congress provided for federal jurisdiction over all non-Indian crimes involving Indians. Trade and Intercourse Acts of 1790, 1 Stat. 137; of 1793, 1 Stat. 329; and of 1796, 1 Stat. 469.

The 1854 enactment was aimed at eliminating the possibility of double jeopardy through the trial of an Indian offender by both an Indian tribe and the federal government. Accordingly, the language now found in the second paragraph of 18 U.S.C. § 1152 was added at that time. The interesting fact about this 1854 addition to 18 U.S.C. § 1152 is that it extends the double jeopardy protection to Indians alone. A non-Indian if charged by a tribe for a criminal offense (as Respondents claim is possible) cannot look to the second paragraph of 18 U.S.C. § 1152 for double jeopardy protection against a later federal charge for the same offense. Under the Tribe's position, and as adopted by the majority opinion below, the fact that this double jeopardy protection extends only to Indians is treated as an oversight in view of the preoccupation of the Congress with the Kansas-Nebraska debates. Amici must agree with the dissenting opinion below that, contrary to indicating an "oversight," the 100-year failure of Congress to correct this alleged "oversight," bespeaks a Congressional intent that the statute as it now stands properly expresses its intent. Surely that intent was to eliminate double jeopardy for all criminal offenders in Indian country. This intent is fully effectuated by the precise language of the second paragraph of 18 U.S.C.

§ 1152. The efficacy and precision of that language necessarily requires that Indian tribes do not have criminal jurisdiction over non-Indians.

The so-called Major Crimes Act, 18 U.S.C. § 1153, provides an even more striking example of Congress' understanding that Indian tribes did not have criminal jurisdiction over non-Indians. This is particularly true when the Major Crimes Act is viewed in the context of the double jeopardy argument just raised. Passed originally in 1885, 18 U.S.C. § 1153 provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

This statute, passed three-quarters of a century before the Indian Civil Rights Act, has the effect of granting the federal government exclusive jurisdiction over major crimes committed by Indians within Indian country and leaves the tribe itself with no major crime jurisdiction in this area whatever. The Respondents would have this Court believe that, notwithstanding the inability of a tribe to exercise criminal jurisdiction over major crimes committed by its own members, it could exercise major crime jurisdiction over nonmembers. It is surely not credible that Congress so intended to circumscribe a tribe's criminal jurisdictional authority with respect to members but not to nonmembers. Rather, the clear import of the Major Crimes Act is that Indian tribes do not have concurrent criminal jurisdiction over non-Indian offenses committed within Indian country.

Preoccupation with the Kansas-Nebraska Act cannot explain passage of the Major Crimes Act in 1885. On the contrary,

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Congress fully understood precisely what it was doing in passing both 18 U.S.C. § 1152 and § 1153. Both sections are premised upon the clear Congressional understanding that Indian tribes may not exercise criminal jurisdiction over non-Indians.

In the court below, Repondents attempted to utilize a piece of proposed legislation defeated in 1834 as the basis for their argument that the predecessor statute of 18 U.S.C. § 1152 contemplated tribal jurisdiction over non-Indians. This attempt by Respondents is entirely misplaced. The House Committee on Indian Affairs did report out three bills which it viewed to be a connected package. The subjects of these three bills included the reorganization of the Department of Indian Affairs, a reenactment of the Indian Trade and Intercourse Act and a bill creating a Western Indian Territory. House Report No. 474, 23rd Cong., 1st Sess., June 20, 1834. The Tribe, in its brief below, points to Section 9 of the Western Territory bill as showing that the criminal jurisdiction authority of the tribes within the proposed Western Indian Territory would extend to non-Indians. Respondents then attempt to bootstrap their position by contending that if the committee desired concurrent jurisdiction under the Western Indian Territory bill, that it must have also intended concurrent jurisdiction under the Indian Trade and Intercourse Act.

The weakness in Respondents' position is that the Indian Trade and Intercourse Act were not restricted simply to the territory encompassed within the Western territory bill. Furthermore, the bills to reorganize the Indian Affairs Department and to recodify the Indian Trade and Intercourse Act passed with little opposition. However, the Western Territory bill aroused sufficient opposition to result in its being tabled in the 1834 Session and never successfully passed. Additionally, resort to the clear language of Section 25 of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, the predecessor to 18 U.S.C. § 1152, provides no basis for Respondents' contention

that it implies concurrent jurisdiction:

> Section 25. *AND BE IT FURTHER ENACTED*, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be enforced in the Indian Country: *Provided*, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

Additionally, the contemporaneous interpretation of the United States Attorney General of this statute is also of particular relevance:

> [T]he 25th Section of the Act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person or property of another: thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves. 2 Op. Attorney General 693 at 695 (1834).

Surely, this interpretation by the United States Attorney General of Section 25 of the Indian Trade and Intercourse Act ought to be accorded more weight than the interpretation suggested by Respondents relying upon the relationship between the Indian Trade and Intercourse Act of 1834 and a defeated bill – a bill which was defeated in part because of strong Congressional opposition to the concept of tribal

criminal jurisdiction over non-Indians.

Respondents, in the court below, also point to an amendment made to the Major Crimes Act as additional support for its contention that the Tribe has concurrent jurisdiction. Respondents cite the amendment offered by Congressman Budd to strike the words "and not otherwise" from the original Major Crimes Act bill. Congressman Budd, in explanation of this proposed amendment, which was successful, stated that:

> The effect of this modification will be to give the courts of the United States concurrent jurisdiction with the Indian courts in the Indian country.... I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases. Cong. Rec., Vol. 16, Pt. II, at 934 (1885).

Respondents, however, miss the point of Congressman Budd's amendment. Congressman Budd sought to give tribes concurrent jurisdiction over Indian offenders only. His amendment did not affect the tribal lack of jurisdiction in criminal cases over non-Indians. Also, despite the success of Congressman Budd's amendment, the courts, in construing the Major Crimes Act, have held that the jurisdiction granted therein is exclusive.[7]

This same federal policy is evident in 18 U.S.C. § 1165. That section makes hunting, trapping or fishing on Indian land without proper authority a federal crime. This section was passed in 1960, and the Senate Committee Report issued in connection with this particular bill makes clear the continuing Congressional understanding that Indian tribes did not have criminal jurisdiction over non-Indians. In part, the Committee Report states:

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7. See *DeMarrias* v. *State of South Dakota*, 319 F.2d 845 (8th Cir. 1963); *State* v. *Youngbear*, 229 N.W.2d 728 (Iowa, 1975), cert. den. 423 U.S. 1018.

> Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law, but a non-Indian trespasser on an Indian Reservation enjoys immunity. This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.... Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. S.Rep. No. 1686, 86th Cong., 2d Sess. at 2-3 (1960).

Finally, the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, also follows in this same Congressional pattern. The major section of that Act, 25 U.S.C. § 1302, makes reference to the denial of certain constitutional rights to "any person" by an Indian court. The Tribe emphasizes the fact that during the course of the legislative history of the Indian Civil Rights Act, the bill was amended to insert that phrase throughout the bill instead of the phrase "American Indian." However, this change does not necessitate the Tribe's conclusion that Congress contemplated Indian tribes exercising criminal jurisdiction over non-Indians. Indeed, the reasoning behind this change, related to the protection of noncriminal rights of non-Indians, is explained at some length in *Dodge* v. *Nakai*, 298 F. Supp. 219 at 24-25 (1968). Also, the *Dodge* case is a prime example of where a non-Indian's rights were protected by the Indian Civil Rights Act even though the question of criminal jurisdiction did not arise. Furthermore, it was the understanding of Congress that the criminal applicability of the bill would be limited to tribal members.[8]

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8. See the discussion in the dissenting opinion below, *Oliphant*, *supra*, at 1016-1017.

Thus, even if the position of the Tribe that its inherent sovereignty included criminal jurisdiction over non-Indians is accepted, one can see that the federal statutory scheme in the area of criminal jurisdiction within the confines of Indian country does, in fact, exclude the exercise of criminal jurisdiction by Indian tribes over non-Indians. This is made abundantly clear in 18 U.S.C. §§ 1152 and 1153. Also, statutes of less central importance, such as 18 U.S.C. 1165 and the Indian Civil Rights Act, make clear that Congress did not intend or contemplate that Indian tribes could exercise criminal jurisdiction over non-Indians.

Throughout all of these statutory enactments, from the first Indian Trade and Intercourse Act to the present day, there is a consistent understanding in federal Indian policy. That understanding is that Indian tribes do not have any criminal jurisdiction over non-Indians, with the sole exception of those instances in which an Indian treaty gives a tribe specific and unambiguous authority to exercise that jurisdiction.

D. THAT THE FEDERAL AGENCIES INVOLVED IN THE ADMINISTRATION OF FEDERAL INDIAN PROGRAMS HAVE TRADITIONALLY RECOGNIZED THE FACT THAT INDIAN TRIBES COULD NOT EXERCISE CRIMINAL JURISDICTION OVER NON-INDIANS.

Certainly, the Bureau of Indian Affairs in the course of its extensive history has had many shifts of policy. This is particularly true in the period since 1970. There is no doubt that the attitude of the Bureau of Indian Affairs toward the question of whether Indian tribes may exercise criminal jurisdiction over non-Indians has changed in recent years.

Consistently, prior to 1970, the Bureau of Indian Affairs always regarded this question as one requiring an unequivocal

answer in the negative. This position culminated in a 1970 opinion by the Interior Department Solicitor which held, "Indian tribes do not possess criminal jurisdiction over non-Indians. . . ."[9]

Furthermore, one commentator has noted that it has been the long administrative practice of the Department of Interior to counsel tribes that they do not have criminal jurisdiction over non-Indians.[10]

A further example of the Bureau's understanding that Indian tribes do not have criminal jurisdiction over non-Indians is found in 25 C.F.R. § 11.2. In this regulation, promulgated by the Secretary of the Interior, the Secretary established the jurisdiction of the Court of Indian Offenses as extending "over all offenses enumerated in Sections 11.38-11.87 NH, when committed by any Indian, within the reservation or reservations for which the Court is established." 25 C.F.R. § 11.2.

In both Felix Cohen's original *Handbook of Federal Indian Law* and the later revision by the Department of the Interior there is a tacit assumption by the writers that Indian tribes do not have any criminal jurisdiction over non-Indians except in those few instances in which specific treaty provisions granted a tribe this type of criminal jurisdiction. In both works, the discussion of crimes in Indian country committed by non-Indians against Indians is premised upon federal, not tribal criminal jurisdiction.[11]

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9. 77 I.D. 113 at 115 (1970). This opinion has subsequently been withdrawn; however, no opinion or memorandum to the contrary has been published by the Department of the Interior.

10. M. Price, *Law and the American Indian*, at 171-174 (1973).

11. F. Cohen, *supra* at 364-365; Department of the Interior, *Federal Indian Law*, pp. 323-324.

Amici contend that the consistency of this interpretation by the Bureau of Indian Affairs from 1934, the date of the revitalization of tribal governments, through 1970, is of particular import. It is only in recent times that the Bureau of Indian Affairs has moved from a firm policy that no such criminal jurisdiction over non-Indians exists in Indian tribes to an uncertain position. This movement is another example of the uncertainty which plagues the development of effective law enforcement within the confines of Indian reservations. Since there has been no development in case law or statutory change justifying this change of position by the Bureau of Indian Affairs, the traditional position of the Bureau ought to be accorded more weight.

E. THAT NEITHER THE TRIBE'S POWER TO EXCLUDE UNDESIRABLE NONMEMBERS NOR THE DOCTRINE OF IMPLI[illegible] CONSENT HAS ANY APPLICABILITY TO [illegible] QUESTION AT HAND.

In the court below the Tribe attempted to bolster its position by arguing that inherent within its power to exclude undesirable nonmembers was included a power to regulate the conditions under which they entered the reservation. Taking the argument one step further, Respondents argued below that a tribe could require that all persons entering the reservation consent to the tribe's criminal jurisdiction, regardless of whether the person entering the reservation be an Indian or non-Indian or a member of the tribe or a nonmember.

This argument is entirely misplaced, as it attempts to do indirectly that which the Tribe could not do directly. The question involved in this case is essentially one of statutory and treaty construction. Both the federal statutory scheme and the history of federal Indian treaty-making show a consistent understanding that Indian tribes could not exercise criminal jurisdiction over non-Indians, except when such jurisdiction was

explicitly granted by a particular Indian treaty. Thus, not only does the power to exclude *not* necessarily include within itself the power to regulate the conditions of entry, but the entire question is moot, since the federal statutory scheme precludes Indian tribes from exercising criminal jurisdiction over non-Indians.

F. THAT REGULATION OF NON-INDIAN CRIMINAL CONDUCT IS NOT AN ESSENTIAL ATTRIBUTE OF TRIBAL SELF-REGULATION AND THEREFORE FEDERAL INDIAN POLICY CAN BE FULLY ACHIEVED AND PROMOTED WITHOUT A TRIBE HAVING SUCH CRIMINAL JURISDICTION.

The court below states:

> Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a *sine qua non* of the sovereignty that the Suquamish originally possessed. *Oliphant*, *supra*, at 1009.

The Tribe holds a similar viewpoint as to the essential nature of the regulation of non-Indian criminal conduct on the reservation. However, this statement does not stand up under examination of this Court's discussions of tribal self-regulation. As stated in *Williams* v. *Lee*, 358 U.S. 217:

> The question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. *Id.* at 220, citing *Utah & Northern Ry. Co.* v. *Fisher*, 116 U.S. 28.

Traditionally, the Court's primary concern has been to

delimit areas of conduct which the state could not regulate on the grounds that it would infringe on the right of Indians to govern themselves. Within these areas, tribal rules wholly govern the conduct of tribal members.

Nevertheless, as noted in *McClanahan*:

> Similarly, notions of Indian sovereignty have been adjusted to take account of the state's legitimate interests in regulating the affairs of non-Indians. *McClanahan, supra* at 171.

Furthermore, as discussed in *Williams* v. *Lee*, this Court has distinguished between tribal relations which were of primary importance and those which would be secondary:

> Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained. *Williams, supra* at 219.

Amici agree in principle with the federal Indian policy which seeks to permit Indian tribes to regulate their own essential internal affairs. However, Amici cannot agree with the Respondents that the exercise of criminal jurisdiction over non-Indians by Indian tribes represents an essential Indian interest. First, it must be remembered that in light of 25 U.S.C. § 1302(7), tribal courts have criminal jurisdiction over only minor offenses and cannot impose sentences in excess of six months imprisonment and a five hundred dollar fine; therefore, tribal courts are quite restricted in the type of criminal jurisdiction they can exercise even over their own tribal members. Accordingly, the extension of this limited criminal jurisdiction to nonmembers would not promote any essential Indian interest. Similarly, after discussing the decisions in

Morton v. *Mancari*, 417 U.S. 535 (1974), and *Fisher* v. *District Court*, 424 U.S. 382 (1976), this Court went on to state:

> Both *Mancari* and *Fisher* involve preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. *United States* v. *Antelope*, ____ U.S. ____ , 97 S.Ct. 1395 at 1399 (1977).

Amici submit that the above statement from the Court's recent decision in *United States* v. *Antelope*, is particularly important in the consideration of this case. This Court has distinguished federal regulation of criminal conduct within Indian country from essential Indian interests. There is no essential Indian interest served in the exercise of tribal jurisdiction over non-Indians; accordingly, there is no frustration of federal Indian policy in holding that such jurisdiction does not exist.

G. THAT PUBLIC POLICY REQUIRES EFFECTIVE LAW ENFORCEMENT WITHIN THE BOUNDARIES OF INDIAN COUNTRY AND THAT SUCH EFFECTIVE LAW ENFORCEMENT CAN BE OBTAINED ONLY THROUGH THE COOPERATION OF FEDERAL, STATE, TRIBAL, MUNICIPAL, AND COUNTY GOVERNMENTS IN A STABLE ATMOSPHERE.

Respondents below made much of the difficulty in enforcing its tribal laws in a situation in which non-Indians are not subject to those tribal laws. The majority opinion in the lower court quoted at considerable length from Respondents' brief on this point in the course of its opinion. *Oliphant, supra*

at 1013-1014. Interestingly enough, Respondents' argument to the court below on this point could be turned around and utilized almost word for word had Petitioner Oliphant been an Indian and had the Suquamish Indian Tribe been a nontribal governmental entity. The problems of limited criminal jurisdiction do not exist solely on the side of the Indian tribes. On the contrary, state political subdivisions and states themselves have virtually identical limitations.

The Court should be aware of the fact that, in spite of these jurisdictional limitations, a reversal of the Ninth Circuit Court of Appeals in this case would not create or continue a jurisdictional void. Non-Indian offenses, occurring within the boundaries of Indian country, would continue to be handled by either the federal courts through the Assimilative Crimes Act, 18 U.S.C. 13, or the state or local courts. There exist, within the boundaries of most Indian reservations, functioning units of county government akin to Kitsnap County. Public Law 280 states, these county governments along with other state subdivisions provide the primary law enforcement in these areas. In states not within the purview of Public Law 280, state or local courts have, in fact, exercised such jurisdiction over minor non-Indian offenders regardless of whether the offense is against an Indian or non-Indian. In the case of offenses against non-Indians, the source of such jurisdiction is unquestioned. *United States* v. *McBratney*, 104 U.S. 621 (1881) (cited with approval in *United States* v. *Antelope, supra*, n. 2, 4 and 9) and *Draper* v. *United States*, 164 U.S. 240 (1896). In the case of minor offenses against tribal members, the source of such state jurisdiction is perhaps less clear. Nevertheless, with the passage of the General Allotment Act, 25 U.S.C. 331 *et seq.*, in 1887, Congress contemplated thousands of non-Indians moving within the boundaries of Indian Reservations. Faced with the numerous contacts between Indians and non-Indians as a result of this movement, the result of *McBratney* and *Draper* has been

extended in practice, by both prosecutors and complainants, to encompass minor non-Indian offenses committed against Indian persons. The federal government has acquiesed in the exercise of this jurisdiction for decades. This acquiesence is "a factor entitled to weight as a part of the 'jurisdictional history.'" *Rosebud Sioux Tribe* v. *Kneip*, __ U.S. __, 51 L.Ed. 2d. 660 at 675 (1977). In any event, the Court is not required to decide the propriety of this practice. Whether the jurisdiction over such minor non-Indian offenses against Indians is exclusive to the federal government or concurrent between the federal government and the states, the fact remains that Indian tribes have no such jurisdiction over non-Indian offenders.

Ironically, Petitioner Oliphant following his arrest by the Suquamish Tribe, was housed in the City of Bremerton jail. The Tribe was able to house its prisoner at the city jail because of a cooperative arrangement with the City of Bremerton. It is this type of governmental cooperation which will ultimately provide effective law enforcement between tribes, states and political subdivisions. Mutual agreements as to cross-deputization, extradition, and use of common facilities will provide strong and effective law enforcement on Indian reservations, not the simple extension of tribal criminal jurisdiction to include non-Indians.[12] It is only through this type of intergovernmental cooperation that the difficulties of limited jurisdiction can be

12. The State of South Dakota has attempted to make provision for the establishment of intergovernmental agreements with Indian tribes. The state in 1973 established an Indian-State Task Force to promote such intergovernmental agreements on a wide variety of issues, including taxation, hunting and fishing and law enforcement. See 1973 *Session Laws of South Dakota*, Ch. 331. Later, the state established a state negotiating team to meet with Indian tribes for negotiation of similar agreements. 1975 *Session Laws of South Dakota*, Ch. 8. This method has resulted in the passage of several mutually beneficial statutes including recognition of tribal governments for purposes of intergovernmental cooperation agreements, SDCL 1-24-1(3); extradition agreements, SDCL 23-24B; tax collection agreements, SDCL 10-12A; free license plates for tribal vehicles, SDCL 32-5-42; availability to Indian tribes of surplus state property, SDCL 5-23-32; and exemption of Indian tribes from sales and fuel taxation, SDCL 10-45-10 and 10-48-3.

effectively overcome. To permit one, but not the other, of these governments to have jurisdiction over both members and nonmembers alike would simply exacerbate the tensions which exist on some reservations without providing a solution to the problem. If change in the status quo in this critical area is to be made, such change should come through unequivocal congressional enactment.

CONCLUSION

For the reasons stated, Amici respectfully urge this Court to reverse the decision of the Court of Appeals.

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